

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
WSS, LLC Request for Waiver of)
Section 1.2109 of the Commission's Rules)

MEMORANDUM OPINION AND ORDER

Adopted: June 16, 2006

Released: June 16, 2006

By the Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau:

I. INTRODUCTION AND BACKGROUND

1. This Order addresses a request for waiver of Section 1.2109 of the Commission's Rules filed by WSS, LLC (WSS), a winning bidder of two licenses in the Lower 700 MHz Band Auction (Auction No. 44). WSS failed to pay the full balance of its winning bids made in Auction No. 44 by the January 8, 2003, late payment deadline.¹ WSS contends that its failure to meet the payment deadlines was due to its misunderstanding of the amount due as specified on a Remittance Advice form (FCC Form 159).² WSS remitted an amount equal to the remaining balance of its winning bid, plus an additional five percent of the unpaid balance, on January 31, 2003, along with a request for waiver.³ For the reasons set forth below, we grant the waiver request.

2. WSS applied to participate in Auction No. 44 and was found qualified to participate in that auction.⁴ Bidding in Auction No. 44 began on August 27, 2002. On September 18, 2002, at the close of Auction No. 44, WSS was the high bidder on two licenses: CMA 566 (Yancey, N.C.) and CMA 567 (Ashe, N.C.).⁵ WSS won both licenses for the minimum opening bid of \$46,000 for each license.⁶ WSS was eligible for a 25% bidding credit, so the net winning bid for each license was \$34,500.⁷ Prior to the auction, WSS had submitted an upfront payment of \$46,000.⁸ Thus, for the two licenses WSS had a total outstanding balance due of \$23,000. On December 9, 2002, the Wireless Telecommunications Bureau released a *Public Notice* stating it was ready to grant WSS's long form applications upon the timely

¹ The payment deadline was December 23, 2002 and the late payment deadline was January 8, 2003. Those deadlines were established following the close of the bidding, pursuant to Section 1.2109(a) of the Commission's rules. *Public Notice*, 17 FCC Rcd 24650 (2002) ("*Prepared to Grant Public Notice*").

² WSS' Request for Waiver of FCC Rule Section 1.2109 at 1 (dated January 31, 2003).

³ *Id.*

⁴ Auction No. 44, Revised Qualified Bidder Notification, 125 Qualified Bidders, *Public Notice*, 17 FCC Rcd 15543, at Att. A. ("*Revised Qualified Bidder Public Notice*").

⁵ Lower 700 MHz Band Auction Closes, Winning Bidders Announced, Down Payments Due October 4, 2002, *Ten-Day Petition to Deny Period, Public Notice*, 17 FCC Rcd 17272, 17298 (2002) ("*Closing Public Notice*").

⁶ *Id.*

⁷ *Id.*

⁸ *Revised Qualified Bidder Public Notice*, 17 FCC Rcd 15543, at Att. A

payment of the remaining balance of each applicant's winning bids.⁹ The *Prepared to Grant Public Notice* announced that the Bureau was prepared to grant WSS's license applications "upon the full and timely payment of the remaining balance" of WSS's winning bids by December 23, 2002.¹⁰ The *Prepared to Grant Public Notice* also stated that a winning bidder that failed to pay the balance of its winning bid(s) in a lump sum by the December 23, 2002 deadline would be permitted to pay the remaining balance by January 8, 2003, along with a late fee equal to five percent of the amount due.¹¹ Finally, the *Prepared to Grant Public Notice* warned that "a winning bidder ... who fails to pay the balance of its winning bid(s) by the late payment deadline of January 8, 2003, will be in default and subject to applicable default payments."¹²

3. WSS states that it submitted a payment on or about December 19, 2002, in the amount of \$11,500. On January 31, 2003, WSS submitted the balance owed of \$11,500, along with an extra \$575, which it claims covers the 5% late fee on the remaining balance. WSS contends that its failure to pay the entire balance owed in advance of the Commission's payment deadline was purely a processing error due to its "misunderstanding of the amount due" as specified in a Remittance Advice form (FCC Form 159) that the Commission sent to WSS.¹³ WSS states that it paid exactly one-half of the total obligation owed for the two licenses because its principal, Amy Hanson, misunderstood the amount due as it appeared on the pre-filled FCC Form 159.¹⁴ WSS avers that Ms. Hanson observed a "Total Fee" amount of \$11,500 in box 27A of the Form 159, but failed to understand that a second "Total Fee" also in the amount of \$11,500 for the second license appeared in box 27B of the form.¹⁵ In its request for waiver of Section 1.2109, WSS alleges that Ms. Hanson "did not notice space (3) of the form which was preprinted to show the actual total fee due of \$23,000."¹⁶ WSS characterizes its mistake as an "innocent mistake during the press of business at year end" and points out that it took "prompt corrective action as soon as the mistake was discovered."¹⁷

II. DISCUSSION

4. Section 1.2109 of the Commission's rules requires that winning bidders pay the balance of their winning bids in a lump sum payment within ten business days following the release of the public notice setting forth the payment deadline.¹⁸ If the winning bidder fails to pay the balance of its winning bid in a lump sum by that deadline, it will be allowed to make payment within ten business days after the payment deadline, provided that it also pays a late fee equal to five percent of the amount due.¹⁹ When a winning bidder fails to pay the balance of its winning bid by the late payment deadline, it is considered to

⁹ *Prepared to Grant Public Notice*, 17 FCC Rcd 24650.

¹⁰ *Prepared to Grant Public Notice*, 17 FCC Rcd 24650, Att. A.

¹¹ *Id.*, citing 47 C.F.R. § 1.2109(a).

¹² *Id.*

¹³ WSS' Request for Waiver of FCC Rule Section 1.2109 at 1 (dated January 31, 2003). As a courtesy, Commission staff provides winning bidders a copy of FCC Form 159 that has been partially filled-in with the amount of the payment that is due.

¹⁴ *Id.*

¹⁵ WSS' Request for Waiver of FCC Rule Section 1.2109 at 1 (dated January 31, 2003).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 47 C.F.R. § 1.2109(a).

¹⁹ *Id.*

be in default on its license and subject to the applicable default payments set forth in Section 1.2104.²⁰ WSS does not dispute that it failed to make the full required payment within the time frame provided under the Commission's rules, but instead argues that given its unique facts and circumstances the public interest would be served by a waiver of the due date for its final payment and that application of the default rule would be inequitable in the instant case.

5. To obtain a waiver of the Commission's competitive bidding rules,²¹ an applicant must show: (i) that the underlying purpose of the rule would not be served, or would be frustrated, by its application in this particular case, and that the grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome, or otherwise contrary to the public interest, or that the applicant has no reasonable alternative.²² WSS's assertion that its principal misread the Form 159 that it received would not alone provide adequate justification for waiver of Section 1.2109's final payment requirement. However, given recent Commission decisions distinguishing between payment processing errors and other types of payment failures,²³ especially where, like here, ability to pay is not a factor, we agree with WSS that a grant of a waiver serves the public interest in the instant circumstances and that WSS's request is "specific, focused and limited in scope with a clear path to compliance."²⁴ Insofar as the Commission received half of the payment required four days before the Commission's deadline for payment of the balance of winning bids and then received the remaining obligation and late fees within days of the Commission's late payment deadline and "promptly"²⁵ after WSS discovered the processing error, we agree that enforcement of the due date would be inequitable or otherwise contrary to the public interest.

6. The overall integrity of the auction process depends on timely payments by winning bidders.²⁶ Prompt payment of auction obligations is an objective indicator that a winning bidder is financially able to meet its obligations and intends to provide service to the public.²⁷ Moreover, enforcement of payment deadlines promotes a fair and efficient licensing process for all participants in our auction, including those who won licenses in the auction and those who did not and fosters economic opportunity and competition in the market place.²⁸ Further, it eliminates the possibility that insincere

²⁰ 47 C.F.R. § 1.2104; *Prepared to Grant Public Notice*, 17 FCC Rcd 24650-51.

²¹ The Commission's competitive bidding rules are set forth at 47 C.F.R. § 1.2101 *et seq.*

²² 47 C.F.R. § 1.925 (standard for rule waiver).

²³ See *Leaco Rural Telephone Cooperative, Inc. Request for Waiver and Reinstatement of Broadband Radio Service Authorization for the Hobbs, New Mexico Basic Trading Area, MDB191, Order*, 21 FCC Rcd 1182, 1187-88 ¶ 14 (2006) ("*Leaco Order*"); *Advanced Communications Solutions, Inc. Request for Waiver of Section 1.2110(g)(4)(iv) and Reinstatement of 900 MHz Specialized Mobile Radio Licenses, Order*, 21 FCC Rcd 1627, 1633-34 ¶¶ 14-18 (2006).

²⁴ WSS' Request for Waiver of FCC Rule Section 1.2109 at 2, citing Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Fourth Memorandum Opinion and Order*, 15 FCC Rcd 17,442, 17,547 ¶ 44 (2000).

²⁵ WSS' Request for Waiver of FCC Rule Section 1.2109 at 2 (WSS claims that it made payment of the remaining balance "promptly after the mistake was discovered.").

²⁶ See *LMDS Communications, Inc., Order*, 13 FCC Rcd 8618, 8621 ¶7 (2000).

²⁷ Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, *Third Report and Order and Second Notice of Proposed Rule Making*, 13 FCC Rcd. 374 at 433, ¶101 (1997) ("*Third Report and Order*").

²⁸ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2375 (1994) (*Competitive Bidding Second Report and Order*); *Mountain Solutions LTD, Inc.*, 12 FCC Rcd 5904, 5907-08 (WTB 1997), *aff'd*, 13 FCC Rcd 21983 (1997), *review denied in part and dismissed in part*, *Mountain Solutions LTD, Inc. v. F.C.C.*, 197 F.3d 512 (D.C. Cir. 1999). See (continued....)

bidders who lack financial resources to deploy systems can shop their newly won licenses to gain financing.²⁹

7. In the instant case, however, the fact that WSS rendered partial payment four days before the Commission's payment deadline and then rendered its full payment and late fees within days of recognizing its payment error and the Commission late payment deadline diminishes concern over its ability to pay for the licenses in question. Such facts mitigate the concern that WSS may not have the capital necessary to both pay for the license and provide service to the public.³⁰ In fact, the record indicates that WSS made a \$46,000 timely upfront payment to secure its auction participation.³¹ Further, there is no indication in the record that the final payment shortage was part of a deliberate effort by WSS to delay its payment. Instead, we agree that this particular error in payment was consistent with WSS's assertion that it had a good faith misunderstanding of the amount it believed to be due at the payment deadline.

8. Demonstrating ability to pay, however, does not satisfy all the purposes underlying the Commission's payment deadlines. As noted above, payment deadlines also safeguard the integrity of the Commission's competitive bidding process. In addition to ability to pay, a licensee's willingness to fulfill all of its obligations created by the winning bid helps ensure that the license was assigned to the party that valued it most highly. An applicant's failure to comply with the Commission's payment deadlines calls into question whether its winning bid actually demonstrated that it valued the license more highly than other applicants or simply demonstrated its willingness to outbid other applicants regardless of its ability to pay on equal terms. While the extent of this doubt may be minimal where the circumstances surrounding failure to comply with the rules suggest unintended payment processing errors, we cannot easily dismiss the concern that another applicant who would have complied with all the Commission's rules should have been assigned the license.

9. In this case, however, we conclude that enforcement of the payment deadline is not necessary to protect against lingering doubts regarding the integrity of the initial license assignment. Under these particular circumstances, where the question of the licensee's financial qualifications have already been eliminated by full payment of the obligation, the benefit of preserving the license assignment outweighs any public benefit gained denying the grant of the payment deadline. In reaching this conclusion, we give considerable weight to WSS's good faith efforts to pay the amount it mistakenly believed was due four days in advance of the Commission's payment deadline as well as its prompt action to remedy the delinquency along with the payment of late fees.

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also Request of GLH Communications, Inc. for Temporary Waiver of Installment Payment Deadlines (47 C.F.R. § 1.2110(g)(4) and Debt Collection Rules (47 C.F.R. §1901 et seq.), *Order*, 18 FCC Rcd 14695, 14698-99 (WTB-AIAD 2003).

²⁹ In Re TPS Utilicom, Inc. *Order*, 16 FCC Rcd. 14835, 39-40 (2001).

³⁰ See *Leaco Order* at 21 FCC Rcd at 1186 ¶ 11, fn. 32, citing Amendment of the Commission's Rules Regarding Installment Payment Financing of Personal Communications Service (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345, 8348-49 ¶ 8 (1998). Notably, if it were not clear that the failure to make full payment was entirely due to administrative error, the Commission could have requested proof of ability to pay as of the payment deadline, as it has done in other contexts. *Id.*

³¹ We also note that WSS had sufficient funds on deposit to timely meet its down payment obligation for the licenses it won in Auction No. 44.

III. CONCLUSION AND ORDERING CLAUSES

10. For the foregoing reasons, WSS's Request for waiver of Section 1.2109 payment requirement is granted.

11. Accordingly, IT IS ORDERED pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, that the Waiver Request, dated January 31, 2003, by WSS LLC, is granted.

FEDERAL COMMUNICATIONS COMMISSION

Margaret Wiener
Chief, Auctions and Spectrum Access Division